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I. INTRODUCTION

The vexing questions raised by the intersection of the First Amendment and the right of publicity[1] make the heads of many constitutional and intellectual property scholars nod, while the heads of other scholars, appropriately enough, bobble. The nodding heads recognize the particular challenges of balancing the right to prevent the unauthorized, and intrusive, use of one's name or likeness against the right to speak, whether through news gathering or through creative forms of expression. Heads begin bobbling, however, when the judicial attempts to balance become mired in questions of property, incentives to create, transformative uses, and often tenuous distinctions between commercial and non-commercial speech. This article offers a simple solution, harkening back to Professor Wechsler's proposal in his oral argument before the United States Supreme Court in *New York Times Co. v. Sullivan*[2] and Justice Hugo Black's dissenting opinion in the same case:[3] Provide absolute immunity for the use of the name or likeness of a public official from a right of publicity

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1. The right of publicity is grounded in the common law right of privacy and allows a party to sue for unauthorized use of her likeness or name for commercial purposes. *See* RICHARD A. EPSTEIN, TORTS § 19.3 (1999). The right has been made statutory in almost all states. *See, e.g.*, CAL. CIV. CODE § 3344 (West 2005).

2. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1965).

3. *See* Brief for Petitioner at 38, *N.Y. Times*, 376 U.S. 254; *N.Y. Times*, 376 U.S. at 296 (Black, J., concurring).

claim. This proposal is the only sensible solution to the inevitably unsuccessful attempt to balance the right of publicity against the First Amendment.[4]

Appeal to the *New York Times* decision in the context of right of publicity cases may be greeted by some skepticism. On the surface, this proposal appears to be at odds with the Supreme Court's holding in *Zacchini v. Scripps-Howard Broadcasting Co.*[5] that the "actual malice" standard, adopted in *New York Times* as a limit on defamation claims brought by public officials, has no application to the right of publicity.[6] In actuality, however, the proposal does not conflict with this holding.[7] Rather, the key point is that Justice Black's dissent, with its absolutist protection for First Amendment rights, is the most apt framework for understanding the right of publicity where public officials are concerned. With regard to the holding in *Zacchini*, the proposal for absolute immunity is perfectly consistent with the Court's distinction between privacy torts, in which falsity is an element of liability (limited by the appropriate application the actual malice standard), and those, like right of publicity, in which falsity is not required[8] and strict liability is necessary. When public officials assert publicity rights, the assumption of strict liability[9] for right of publicity claims should be reversed to a rule of no liability. Such an approach is consistent not only with the First Amendment values articulated in *New York Times*, but also, counterintuitively, with the privacy and economic values of the right of publicity.[10]

Some will undoubtedly argue that this proposal's attempt to avoid chilling speech will serve only to freeze other dangerous slopes. Visions of paparazzi stalking elected officials or even candidates for public office and then seeking protection under the proposed absolute immunity may spring to mind.

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4. *See* discussion *infra* Part III.

5. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

6. *Id.* at 574.

7. *See* discussion *infra* Part II.A.2.

8. *See* J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 3.26 (2d. ed. 2004).

9. *See* Hanson v. Globe Newspaper Co., 34 N.E. 462, 464 (Mass. 1893) (establishing that common law defamation is a strict liability tort). For a discussion of the rule of liability in common law defamation, see EPSTEIN, *supra* note 1, at § 18.7.

10. *See* discussion *infra* Part IV.C.

A rule of no liability would potentially subject individuals dedicated to public service to harassment from media. The media will be allowed to use their names and likenesses without restraint for advertising, in cheap front page spreads or on the evening news. These concerns are not significant because many of them can be addressed with existing laws that protect privacy, such as false light[11] or intrusion,[12] or other aspects of intellectual property law, such as false association under section 43(a) of the Lanham Act.[13] The property protections of the right of publicity are superfluous to protect these interests where a public official is concerned and are potentially harmful since First Amendment values are at stake. However, as demonstrated in the discussion of the recent European Court of Human Rights decision in the Princess Caroline case,[14] the problem of whether to protect the private lives of public officials provides special challenges for the absolutist position.[15]

Moreover, recognizing the right of publicity for public officials is inconsistent with the justifications for protecting publicity. The right of publicity serves two goals. The first is to protect intrusions into one's private sphere through the commercial appropriation of one's personality.[16] This protection safeguards the private person from being made public without his or her consent.[17] The second goal is to protect the investment that a public person has made in one's persona, from which he or she obtains economic value from misappropriation without consent.[18] These two goals are complementary and together permit the self-regulation of one's identity,

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11. *See* EPSTEIN, *supra* note 1, § 19.5 (describing that "certain public portrayals of [plaintiff] are sufficiently 'off' that they could prove to be highly offensive to ordinary individuals").

12. *See id.* § 19.2 (liability for intentional intrusion "upon the solitude or seclusion of another") (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

13. 15 U.S.C. § 1125(a) (2000) (provision of Lanham Act, the federal statute that governs trademark law, which prevents use of trademark to create false association in the mind of consumers).

14. Case of Von Hannover v. Germany, 40 Eur. Ct. H.R. 1 (June 24, 2004).

15. *See* discussion *infra* Part IV.B.

16. *See, e.g.*, Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 411 (1999).

17. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 71 (Ga. 1905).

18. *See, e.g.*, Ira J. Kaplan, *They Can't Take That Away From Me: Protecting Free Trade in Public Images from Right of Publicity Claims*, 18 LOY. L.A. ENT. L.J. 37 (1997).

protecting both those who want to remain non-public and those persons who have voluntarily obtained value from their publicity.

Neither of these goals applies to those who hold public office. The first goal is irrelevant since a public figure is by definition in the public sphere. Thus, while the decision to forsake some dimension of one's privacy does not create a license to invade all of one's private sphere, protection under the property claim for right of publicity may not be the best option. Instead, the private life of a public official is better protected by claims of false light and defamation. Furthermore, while the public official often creates a public persona, much like an actor or other celebrity, the public persona of a public official must be held up to public scrutiny and examination and is hence not a tradable commodity like the public persona of a celebrity. An Elvis impersonator may be commenting on the Elvis image, but more likely he really would like to be Elvis, usurping his fame, glory, and cachet. A George Bush impersonator (whether of Bush *pere* or Bush *fils*) is making a different statement and almost certainly has no desire to step into the shoes or lifestyle of his target. If right of publicity of a public official is protected, the special public status that a political persona has for the purposes of commentary, criticism, and the political process is ignored.[19] Therefore, the right of publicity is inappropriate for a public official since it serves neither to prevent inappropriate publicity nor to regulate the appropriate marketing of one's public identity.

The proposed abolition of the right of publicity for public officials, within the goals of the right itself, is consistent with most accepted visions of politics.[20] As the debate over the Vanna White case[21] indicates, scholars differ greatly with regard to how much celebrities should be allowed to profit from a property right in their public persona. It seems inconsistent with the values of politics to allow a public official to profit from his or her political persona. While we may be comfortable with the notion of an actor franchising his likeness for profit, a certain degree of uneasiness is raised if a

19. *See* EPSTEIN, *supra* note 1, § 18.16.1 (discussing constitutional privilege in the context of public officials).

20. *See* discussion *infra* Part III.C.

21. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992).

politician decides to spend his term in office selling paraphernalia that markets his political identity. The uneasiness stems from a concern over a politician profiting from his position, and from the inconsistency of public service and private aggrandizement. The commercial motives informing the right of publicity are far removed from the motivations that lead or should lead people to seek public office. This uneasiness is the catalyst for the proposal to disallow right of publicity claims by public officials through an absolutist application of the First Amendment as articulated by Justice Black.

I present my argument as follows: Section II presents the current doctrinal limits placed on the right of publicity by the First Amendment and compares it with the limitations set by *New York Times*.[22] Section III follows from the discussion of *New York Times* to examine how public officials are different from celebrities under the right of publicity, and why these differences support an absolutist First Amendment limit on the right of publicity for public officials.[23] Section IV presents how the absolutist position would work in practice through an analysis of the Schwarzenegger bobblehead dispute and the recent decision by the European Court of Human Rights.[24] Section V concludes.[25]

II. THE CURRENT LINE BETWEEN THE FIRST AMENDMENT AND THE RIGHT OF PUBLICITY

Before making the case to exempt public officials from right of publicity claims on First Amendment grounds, it is necessary to present the current state of the law on the First Amendment and right of publicity and compare the First Amendment skein with the *New York Times* standard. This discussion is designed to emphasize the salient First Amendment issues raised by the right of publicity as a comparison with the protection of speech rights within defamation law.

22. *See* discussion *infra* Part II.B.2.
23. *See* discussion *infra* Part III.
24. *See* discussion *infra* Section IV.
25. *See* discussion *infra* Section V.

A. *The First Amendment Skein for the Right of Publicity*

1. *Judicial Background: Pre-*Zacchini

Freedom of expression and the right of publicity have enjoyed a strained relationship from the first recognition of the tort claim. In the 1902 case *Roberson v. Rochester Folding Box Company*,[26] the New York Court of Appeals declined to recognize a privacy cause of action for the unauthorized use of a young woman's image in an advertisement.[27] Referring to the famous Warren and Brandeis article[28] advocating the privacy tort as "a clever article,"[29] the majority extolled the freedom of expression and limited it solely by a cause of action for libel or harm to reputation.[30] Although the New York Court did not engage in extensive First Amendment analysis, even to the meager extent the jurisprudence existed in 1902, the majority opinion demonstrated a clear hesitancy to expand the right of privacy because of its potential negative limits on free expression.[31] The Georgia Supreme Court, however, went to the other extreme in 1905 in *Pavesich v. New England Life Insurance Company*.[32] This ruling was the first state court opinion to recognize the right of privacy.[33] The First Amendment succumbed to the privacy claims of an Atlanta artist, whose image was misappropriated in an advertisement.[34] As the *Pavesich* court carefully noted:

> The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other.[35]

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26. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (1902).
27. *Id.* at 447-48.
28. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
29. *Roberson*, 64 N.E. at 444.
30. *Id.* at 448.
31. *Id.* at 448-49.
32. Pavesich v. New England Life Ins. Co., 50 S.E. 68 (1905).
33. *Id.* at 70.
34. *Id.* at 68-69.
35. *Id.* at 73.

The court concluded, however, that in the advertising copy, there was "not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guaranties to a person the right to publish his sentiments on any subject."[36] As with the *Roberson* court, the *Pavesich* court found no need to balance the right of free speech against rights of publicity.[37] However, unlike the *Roberson* court, the *Pavesich* court held that in the tension between the right to be free of unwanted publicity and the right to speak, the need for detente disfavored speech.[38]

The post-*Pavesich* case law on the First Amendment and the right of publicity followed the anti-speech precedent set by the Georgia Supreme Court[39] until the United States Supreme Court addressed the issue of First Amendment limitations on the right of publicity straight on in *Zacchini*. For those familiar with the case, describing this 1977 decision as "straight on" is true, perhaps, in name only since the Court's holding rested on reasoning more relevant to copyright than right of publicity.[40] The *Zacchini* case, for example, is less on point than the New York Supreme Court's 1968 decision, *Paulsen v. Personality Posters, Inc.*,[41] in which the trial court held that the right of publicity claim gave way to the First Amendment when a political figure was at issue under, surprisingly enough, *New York Times*.[42] Nonetheless, despite its disappointing result for First Amendment advocates, the *Zacchini* case is the sole decision on the First Amendment and the right of publicity from the highest court in this country.

Landing into First Amendment territory with the thud of a cannonball, the United States Supreme Court's analysis in *Zacchini* centered on the balance between the economic interests of the celebrity whose fame arose from being shot from a

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36. *Id.* at 80.

37. *Id.* at 81 (stating that unauthorized publication of likeness for profit is unquestionably an invasion of the right of publicity).

38. *Id.* at 80 (unauthorized publication of likeness not within the "liberty to print" of U.S. Constitution).

39. *See* MCCARTHY, *supra* note 8, § 8:4.

40. *See* 433 U.S. at 576-77 (discussing purpose of right of publicity as providing economic incentives and compensation for investment in creative activity).

41. 299 N.Y.S.2d 501 (N.Y. Special Term 1968).

42. *Id.* at 506-07.

cannon and surviving and the public-mindedness of a local news station in Ohio that broadcasted the entire act on the evening news.[43]

The Ohio Supreme Court found in favor of the news station, holding, as the U.S. Supreme Court described, that a newscaster was "constitutionally privileged to include in its newscasts matters of public interests that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose."[44] The state court holding, based on the First Amendment of the U.S. Constitution and the free speech provisions of the Ohio state constitution, would have allowed a right of publicity claim against a newscaster broadcasting a matter of public interest only upon a showing of actual malice.[45] The state court's holding rested on the U.S. Supreme Court's decision in *Time, Inc. v. Hill*,[46] which had introduced the element of malice in the case of a suit against a media defendant for the tort of false light,[47] following the analysis of *New York Times* for defamation.[48] The U.S. Supreme Court, however, reversed the Ohio Supreme Court on the grounds that false light claims and right of publicity claims are different. The difference between the two claims, as articulated by the Court, made it inappropriate to introduce the element of malice into the right of publicity claim.[49] In effect, the *New York Times* approach, while appropriate for defamation and false light, was not appropriate for right of publicity.

The key difference for the Court was the nature of the plaintiff's interest protected by these various torts.[50] Defamation, false light, and right of publicity are all strict liability torts. Strict liability, however, conflicts with the right of ex-

43. *Zacchini*, 433 U.S. at 563-64.

44. *Id.* at 569.

45. *Id.* at 567-68.

46. 385 U.S. 374 (1967).

47. The actual malice standard was extended to a false light cause of action because of the close affinity with a defamation action. Both allow someone to sue for harm to one's reputation in the community. A public official's ability to curtail political speech is as a great under a false light claim as it is under a defamation claim. The actual malice standard limits a public official's ability to curtain speech under either claim. *See* EPSTEIN, *supra* note 1, § 19.5.

48. *Time, Inc.*, 385 U.S. at 386-88.

49. *Zacchini*, 433 U.S. at 573.

50. *Id.* at 574-75 (describing tort of right of publicity in terms of economic harm).

pression when someone utters a statement that allegedly defames the subject of the statement, puts him in a false light, or violates his right of publicity.[51] In *New York Times* and *Hill*, the Court protected First Amendment interests by imposing liability for defamation or false light only if the plaintiff could show a high degree of fault on the part of the speaker.[52] The Ohio Supreme Court attempted to extend the protection to the right of publicity, but failed to distinguish among these torts.[53] Defamation and false light claims protect the reputation of the plaintiff, because when reputation is at stake, the Court reasoned, it is sensible to inquire whether the media defendant intended to harm the plaintiff or, instead, recklessly reported the facts in a way that damaged the plaintiff's reputation.[54] The right of publicity, by contrast, protects the economic interests of the plaintiff much in the same way as copyright and patent laws. When economic interests are at stake, the Court's logic continued, the media defendant should not be excused on speech grounds, and instead be held strictly liable, if it has deprived the plaintiff of his entire economic interest, as the Court thought the newspaper had done when it broadcasted Zacchini's entire cannonball act.[55]

2. *Interpreting* Zacchini

The *Zacchini* opinion lacks in many respects, the first one being that of clear articulation. One possible articulation is that a defendant is not immunized from a right of publicity under the First Amendment if he has deprived the plaintiff of the full economic value of the right. This articulation is helpful in that it provides some guidance for future cases. For example, presumably if the defendant had shown only part of the act, then a First Amendment defense can be invoked. The problem, of course, is that this articulation of the holding, which I propose is the best that we can do based on the opinion, does not provide a clear First Amendment analysis. Conventional categories, such as commercial versus noncommercial speech or public forum versus non-public forum,

51. *See id.* at 573-74.
52. *Id.* at 570.
53. *Id.* at 570-71 (according to the United States Supreme Court).
54. *See id.* at 573-74.
55. *Zacchini*, 433 U.S. at 572.

are noticeably absent. Because these issues are left unresolved, it should not be surprising that the *Zacchini* case raises more questions than it answers. Of course, many judicial opinions raise more questions than they answer. The problem here is that the *Zacchini* case does not even answer the question it purportedly intended to resolve: What is the nature of the First Amendment privilege for right of publicity claims?

One way to reconcile the *Zacchini* case within First Amendment jurisprudence is to create a new category of free speech jurisprudence. The most likely candidate is to recognize *Zacchini* as a case involving the conflict between property and speech, as opposed to the current categorization of speech. Certainly, the Court's discussion that the interests at issue are more akin to copyright and patent than to reputational interests is consistent with this categorization. The problem with this interpretation is the implication for future claims. If the trigger for the loss of any First Amendment defense is that the defendant has taken the full value of plaintiff's publicity rights, what is the result if, for example, the defendant makes unauthorized use of the plaintiff's name? Does this use of the name constitute loss of all value since the plaintiff has lost the value of licensing the name in this instance to the defendant? Or does this use of the name constitute loss of no value since the plaintiff still retains the right to profit from licensing the name in other instances? The latter result seems more sensible given the doctrine of nominative use that permits the mention of names in newspaper reporting or analogous contexts without the requirement of licensing.[56] Thus, full economic value must mean something more than the profits that can be earned from licensing the right to the particular defendant. However, if this is so, then this reasoning conflicts with the determination that Zacchini lost all value by the broadcast of his act on a local evening news program in Ohio, because he did not lose the ability to market himself in states that did not pick up the broadcast or to market the act through his authorized sales of videotapes of the act. Defining this new category of property-speech conflicts created by *Zacchini* requires a more rigorous articula-

56. *See* New Kids on the Block v. News Am. Publ'g, 971 F.2d 302 (9th Cir. 1992).

tion of the economic interests at stake.

The issue of economic interests becomes more perplexing upon closer scrutiny of the question: What aspect of Zacchini's right of publicity was at issue in the case? Factually what was misappropriated was not simply Zacchini's name or likeness, but, instead, his entire act, which was integral to his persona. The case is similar to the *Midler*,[57] *Motschenbacher*,[58] and *White*[59] cases, in which various aspects of the plaintiffs' activities constituted the publicity right, respectively, the voice and singing style, class of racecar, and turning letters while blonde. More sensibly, especially in light of the Court's appeal to copyright and patent, the *Zacchini* case could be seen as a live performance case, with the news station's unauthorized taping and broadcasting of the entire act analogous to the bootlegging of a band's live concert. When seen this way, one of the problems with the *Zacchini* case is that of improper categorization. While the Ohio court may have had a better approach to balancing the First Amendment with the right of publicity than did the U.S. Supreme Court, there still remains the nagging question of whether the case was a right of publicity case at all. Upon closer scrutiny, the only Supreme Court case addressing the First Amendment limits on the right of publicity is a striking example of bad facts making even worse law.

3. *Post-*Zacchini *Case Law Regarding Right of Publicity Claims*

The inadequacy of the *Zacchini* decision created difficulty for subsequent courts to define a clear boundary between the First Amendment and right of publicity claims. There have been three notable post-*Zacchini* approaches: (1) demarcating a line between commercial and non-commercial speech, (2) imposing a higher standard for speech in the case of injunctive relief, and (3) developing a doctrine of transformative use.

The first approach denies First Amendment protection when the right-of-publicity defendant is engaged in commercial exploitation of the plaintiff's publicity. The Georgia Su-

57. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

58. Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).

59. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992).

preme Court's decision is a case involving the unauthorized manufacture and sale of busts of the late Reverend Martin Luther King, Jr.[60] The majority, following its precedent in *Pavesich*, held that the busts, created for purely "financial gain," were not speech protected by the First Amendment.[61] A concurring judge dissented from this First Amendment analysis, stating that under First Amendment jurisprudence, the bust did constitute speech, but concluded that the First Amendment values gave way to the rights of protecting one's public image in this case.[62] The Georgia Supreme Court's approach illustrates the application of First Amendment jurisprudence for commercial speech in the right of publicity context. Under this approach, appropriately applied, the First Amendment limits on the right of publicity would be based on the standards created for protection of commercial speech.

The second approach in the case law applies a prior restraint analysis[63] to right of publicity claims.[64] This approach is illustrated by the Second Circuit's decision in *New York Magazine v. Metropolitan Transportation Authority*,[65] a case involving the transit authority's refusal to place an advertisement for New York Magazine on the side of city buses because the advertisement included an unauthorized use of Mayor Giuliani's name.[66] The Second Circuit held that the magazine's ad was protected commercial speech and that the city's refusal to run the ad was a prior restraint on speech.[67] The right of publicity, in this case, arose in an unusual manner, not as a direct claim brought by the mayor, but as a justification by the transit authority for not permitting the advertisements on the city buses.[68] Nonetheless, the court's analysis illustrates how prior restraint principles would apply

60. Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982).

61. *Id.* at 700.

62. *Id.* at 708-09.

63. A prior restraint is a governmental regulation that restricts speech before it is communicated. *See* Near v. Minn., 283 U.S. 697 (1931) (state seeking injunction against publication of newspaper is an example of a prior restraint).

64. For a discussion of prior restraints, see Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169-80 (1998).

65. N.Y. Magazine v. Metro. Transp. Auth., 136 F.3d 123 (2d Cir. 1998).

66. *Id.* at 125-26.

67. *Id.* at 131-32.

68. *Id.* at 126.

to limit the right of publicity claim.[69]

The final, and most clearly articulated approach, is that of the transformative use analysis, illustrated by the Sixth Circuit's decision in *ETW Corp. v. Jireh Publishing, Inc.*, a case involving the unauthorized creation and distribution of a commemorative painting of Tiger Woods winning the Masters Tournament in Augusta in 1997.[70] The Sixth Circuit, citing precedent from the Ninth[71] and Tenth Circuits,[72] as well as from the California Supreme Court,[73] ruled that the artwork was protected from the right of publicity claim under the First Amendment because it contained "significant transformative elements which made it especially worthy of First Amendment protection and also less likely to interfere with the economic interest protected by" the right of publicity.[74] Under a similar transformative use test, the Ninth and Tenth Circuits also immunized from the right of publicity a magazine's alteration of a famous photograph of Dustin Hoffman as his Tootsie character[75] and a company's creation of parody baseball cards featuring the likenesses of major league baseball players.[76] However, the fan's creation of a T-shirt depicting the likenesses of The Three Stooges was not protected by the First Amendment under the California Supreme Court's application of the transformative use test, because it lacked transformative characteristics.[77] Under the First Amendment, the transformative use approach creates immunity from the right of publicity for highly creative uses of the plaintiff's image, regardless of the commercial motivations of the defendant.

The First Amendment skein for the right of publicity can best be understood as creating a special category for property-speech conflicts.[78] Using the *Zacchini* analysis, within this

69. *See id.* at 132.

70. ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 918 (6th Cir. 2003).

71. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001).

72. Cardtoons L.C. v. Major League Baseball Players Assoc., 95 F.3d 959 (10th Cir. 1996).

73. Comedy III Prods., Inc. v. Saderup, Inc., 21 P.3d 797 (Cal. 2001).

74. *Jireh Publ'g, Inc.*, 332 F.3d at 938.

75. *Hoffman*, 255 F.3d at 1183.

76. *Cardtoons*, 95 F.3d at 972-73.

77. *Saderup Inc.*, 21 P.3d at 810.

78. For a discussion of property-speech conflicts, see Lemley & Volokh, *supra* note 64; Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN L. REV. 1 (2001).

category, speech claims trump the economic interests of the right of publicity claimant when the speech claimant takes less than the full economic value of the defendant. Post-*Zacchini* courts have tried to clarify this analysis by taking into consideration the commercial nature of the defendant's use of plaintiff's publicity, the prior restraint of limiting defendant's activities, and the transformative nature of defendant's use of plaintiff's publicity. Admittedly a work in progress, the First Amendment skein suffers from a lack of coherence as courts have attempted to balance speech with economic interests. A brief comparison with the approach to First Amendment limitations on defamation claims hints at the possibilities for providing some needed structure to the right of publicity analysis, particularly when the publicity rights of public officials are at issue.

B. Comparing Speech Values in the Realms of Defamation and Publicity

1. Overview

As the Ohio Supreme Court demonstrated in *Zacchini*, the *New York Times* standard, which limits strict liability for speech-related torts, serves as a beacon for protection of First Amendment values.[79] However, the U.S. Supreme Court's decision in the same case illustrates limitations of this *New York Times* approach.[80] A closer examination of how *New York Times* incorporates the First Amendment into speech-related tort claims is helpful to understand why the right of publicity should be limited for public official claimants.

The facts of *New York Times* are legendary.[81] Arising within the civil rights struggle in Alabama, the case was sparked by a notice in *The New York Times* placed by the NAACP to inform the public about actions against civil rights workers in the South. The notice mentioned how civil rights

79. *Zacchini*, 433 U.S. at 567-68.

80. *Id.* at 573.

81. For background history and discussion, see Kermit L. Hall, *"Lies, Lies, Lies": The Origins of* New York Times Co. v. Sullivan, 9 COMM. L. & POL'Y 391 (2004); Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 606 (1983); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

workers had been harassed and jailed by public officials in the State of Alabama and referred in general terms to Alabama police officers.[82] The defamation suit brought against the newspaper was grounded in Alabama law which provided a defense of "fair comment."[83] The problem for *The New York Times* was that the notice contained a few details that were factually inaccurate. The details concerning the arrest of Martin Luther King, Jr. and the number and actions of the protestors were admittedly trivial, but sufficient to defeat the newspaper's defense of absolute truth under Alabama state law.[84] The U.S. Supreme Court overturned the lower court judgment against *The New York Times* for the defamation claim, holding that when a public official brings a defamation claim he must show the defendant acted with actual malice, meaning that the defendant published the defamation with actual malice.[85]

Subsequent Supreme Court cases extended the *New York Times* holding to the tort claims of false light and intentional infliction of emotional distress, and to public figures bringing defamation claims.[86] As explained above, the Supreme Court refused to extend the holding to the right of publicity claim.[87] I am not advocating the application of the public official analysis, employed by the *New York Times* majority, to the right of publicity claim. Instead of extending the actual malice standard put forth by the *New York Times* majority to the right of publicity claim, a better approach is to apply the absolutist approach proposed by Justice Black in his *New York Times* dissent. Thus, a public official would not be allowed to bring a right of publicity claim under any circumstances, a point that I explain in the next section.

2. *The Implications of Justice Black's Dissent in* New York Times

Justice Black's famous statement: "An unconditional

82. *N.Y. Times*, 376 U.S. at 256-58.

83. *Id.* at 267 (fair comment required that the statement be "true in all [its] particulars").

84. *Id.* at 259.

85. *Id.* at 280 (actual malice meaning that the defendant acted with knowledge of falsity or reckless disregard to the truth of the statement).

86. *See Time Inc.*, 385 U.S. 374; Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Curtis Publ'g v. Butts, 388 U.S. 130 (1967).

87. *See* discussion *supra* Part II.A.1.

right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment," is perhaps the clearest rule in any area of law.[88] This "unconditional right" is what Professor Hebert Wechsler had endorsed in his brief before the Supreme Court on behalf of *The New York Times*. Evoking the Sedition Act of 1798,[89] Professor Wechsler argued that the strict liability of the tort of defamation is inappropriate when wielded by a public official against the press.[90] For Professor Wechsler, absolute immunity was the best option to mitigating the abuse of defamation law by public officials.[91] As alternatives, he proposed either a requirement that the public official show that the newspaper acted with reckless disregard for the truth, the position adopted by the *New York Times* majority, or that the public official show special damages to his reputation.[92] The issue of damages was particularly salient because of the half-million dollar verdict against *The New York Times*. Given the relative ease with which damages could be found in defamation cases, either based on the sentiments of the fact finder or the spinning of facts, the special damage alternative was perhaps not viable. Either absolute immunity or a fault requirement was the only realistic option for the Court to adopt.

Justice Black's affirmation of an unconditional right rested on recognizing the inadequacies of the other alternatives available to protect First Amendment values.[93] The majority opinion did not comment on the possibility of recognizing an unconditional right. Instead, it fashioned a compromise position based on an appeal to state defamation law; it adopted the Kansas actual malice standard for defa-

88. *N.Y. Times*, 376 U.S. at 297 (Black, J., concurring).

89. The Sedition Act of 1798 made it criminal to publish any false, scandalous, or malicious writing against the government or a governmental official. Enacted under President John Adams as a means to protect the country from alien influence, the act was used, until their repeal in 1802, by the majority Federalist party against the minority Democratic-Republican party and served to stifle political speech. *See* James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117 (1999).

90. *See* Brief for Petitioner, *supra* note 3, at 47-48 (arguing that permitting a public official to sue a newspaper for defamation serves to repress speech like the Sedition Act of 1798).

91. *Id.* at 55-56.

92. *Id.* at 60-69.

93. *N.Y. Times*, 376 U.S. at 273-74.

mation.[94] Justice Black, however, rejected any compromise position, stating uncategorically:

> [F]reedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials.[95]

While the majority made it more difficult for public officials to bring defamation claims, Justice Black's position would have barred such suits since the mere threat of a defamation suit would be enough to chill the kind of political discourse necessary for a democracy.

Justice Black's position has been criticized as too speech-friendly, turning the marketplace of ideas into a realm of mudslinging against public officials.[96] Given the state of current political discourse,[97] however, it is hard to say that the majority position, which is the current state of the law of defamation, fares any better in uplifting political discourse. Nonetheless, there is something discomfiting about a world in which public officials can be defamed with impunity. The image of the late Senator Edmund Muskie reduced to tears in the streets of New Hampshire because of the scurrilous reporting of *The Manchester Guardian* comes to mind at the mention of a press unfettered in its coverage of public officials. Despite the dangers posed by Justice Black's position on defamation law, his absolutist position is perfectly appro-

94. *See id.* at 279-80 (citing Coleman v. MacLennan, 98 P. 281 (1908)).

95. *N.Y. Times*, 376 U.S. at 296-97.

96. For a discussion of some of the criticism of Justice Black's position, see John C.P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471 (2003).

97. *See, e.g.*, CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT? 97-98 (2003) ("freedom of expression diminishes the gap between a nation's leaders and its citizens, and for that reason promotes the monitoring of the former by the latter"). *But see* Epstein, *supra* note 81 (arguing that the constitutional protection of speech may stifle the communication of certain political viewpoints for fear of unfavorable response).

priate as a limit on the right of publicity. The Court was correct in not extending the *New York Times* fault standard to the right of publicity in *Zacchini*, but it should have considered Justice Black's dissent. As demonstrated in the next section, the absolutist position not only provides some guidance to the current uncertainties about First Amendment limits on the right of publicity, but it also furthers both the First Amendment values so forcefully articulated by Justice Black and the purposes of the right of publicity as formulated in current intellectual property jurisprudence.[98]

III. WHY PUBLIC OFFICIALS ARE DIFFERENT FROM CELEBRITIES

This section develops the case for exempting public officials from right of publicity claims. The argument progresses in three steps. The first step is to show that the First Amendment is implicated in the use of the image of a public official, regardless of the manner of use.[99] The second is to show that public officials do not need the protections of the right of publicity.[100] The third, and final, point is that an absolutist position is consistent with most sensible normative visions of politics.[101]

A. The Use of the Image of a Public Official Implicates the First Amendment Regardless of the Nature of the Use

The First Amendment's application in the context of the right of publicity is often unpredictable. The Georgia Supreme Court denied First Amendment protection in both *Pavesich* and the Martin Luther King, Jr. bust case because the uses at issue were low value speech, created for pure financial gain.[102] The U.S. Supreme Court, however, has been more protective of pure commercial speech than the Georgia courts, and the more recent right of publicity cases reflect this higher degree of protection.[103] The Sixth, Ninth, and Tenth Circuits found that the First Amendment protected a limited

98. *See* discussion *infra* Part IV.
99. *See* discussion *infra* Part III.A.
100. *See* discussion *infra* Part III.B.
101. *See* discussion *infra* Part III.C.
102. *See* discussion *supra* Parts II.A.1, II.A.2.
103. *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001); Comedy III Prods., Inc. v. Saderup, Inc., 21 P.3d 797 (Cal. 2001).

edition painting, a magazine cover, and baseball trading cards with celebrity images.[104] However, the California Supreme Court failed to extend First Amendment protection to a T-shirt bearing the unauthorized likenesses of The Three Stooges.[105]

No organizing principle can explain these disparate results. As one commentator noted, the cases challenge conventional categories of commercial and non-commercial speech.[106] The concept of transformativeness may provide guidance, suggesting that First Amendment protection is ratcheted to the amount of creativity provided by the defendant.[107] However, the word transformative masks, rather than dispels, the elusiveness.[108] The form of speech protected under the First Amendment in right of publicity cases is a mystery awaiting a solution.

The proposal of no liability provides a possible solution. It is a solution that recognizes that all uses of the image of a public official, whether on a T-shirt, a coffee mug, or in the form of a bust, implicate First Amendment values. A purchaser of a commodity bearing the likeness of the current president may seek to express approval or to show contempt by desecrating the icon. In either instance, what is being expressed is a political opinion that is linked to the representation of the image. The same could be said for advertisements that use the likeness of a public official. However, if the use of the image of the public official does constitute false advertising or false endorsement, the proper cause of action falls under a consumer protection statute, rather than a right of publicity claim.[109] My proposed rule of no liability does not conflict with existing consumer protection law. Instead, it

104. *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003); *Hoffman*, 255 F.3d 1180; Cardtoons L.C. v. Major League Baseball Players Assoc., 95 F.3d 959 (10th Cir. 1996).

105. *See Saderup, Inc.*, 21 P.3d 797.

106. *See* Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003).

107. *See ETW Corp.*, 332 F.3d 915.

108. *See, e.g.*, Diane Leenheer Zimmerman, *The More Things Change the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y USA 251 (1998).

109. A consumer protection statute would be appropriate since the concern is with the confusion to consumers arising from a false endorsement or false advertising rather than with an economic or personal harm to the public official from use of his image.

frees the marketplace of ideas to the use of the image of a public official, except in those instances when the use constitutes false advertising or false endorsement that results in consumer confusion.

A potential criticism to the proposal of absolute immunity is that it, on the one hand, protects speech involving a public official from a right of publicity claim, but, on the other hand, exposes such speech to false advertising or false endorsement claims. The latter, however, is less speech restrictive than a right of publicity claim. Under a right of publicity claim, the public official would be able to enjoin any use of his image except for those that are highly transformative.[110] Under a false advertising or false endorsement claim, however, the public official would have to establish consumer confusion and prove that the speech was false.[111] This last requirement potentially triggers the First Amendment protections under the *New York Times* actual malice standard. The case of the Governor Schwarzenegger bobblehead illustrates the difference.[112] Under a right of publicity claim, the Governor could enjoin the depiction of his image with a gun. This was the result of the settlement in the actual dispute. Under a false advertising or false endorsement claim, however, the Governor could enjoin the depiction of his image with the gun only if the depiction caused consumer confusion as to his association with or endorsement of a gun or the particular make of the gun represented in the bobblehead. A right of publicity claim protects the economic and property rights of the public official; a false advertising or false endorsement claim protects the interests of consumers to be free from confusion.

A potentially more devastating criticism of the proposal is that it does not go far enough because it precludes only public officials, and not public figures, from bringing a right of publicity cause of action. The rule of no liability would not alter the result in the Martin Luther King, Jr. bust case or in the Vanna White case, each of which potentially chill speech. A broad exemption to include public figures, as well as public officials, would reduce a right of publicity to the tort of pri-

110. *See, e.g.*, *ETW Corp.*, 332 F.3d 915 (right of publicity claimant seeking injunction of the use of his image).

111. *See supra* note 13, and accompanying text.

112. *The Schwarzenegger Bobblehead Case: Introduction and Statement of Facts*, 45 SANTA CLARA L. REV. 547, 552-54 (2005).

vacy, protecting only non-celebrities and would not be consistent with the two goals of the right of privacy – to protect against unwanted invasions of private persons and to prevent against unwanted commercial appropriation of public persons.[113] Furthermore, extending the proposal to include public figures would not be consistent with the First Amendment goals articulated by Justice Black in *New York Times*. In the case of public figures, the need to balance economic interests with speech values is more pressing than in the case of public officials, where the need to protect economic interests is nonexistent, as I argue in the next section.

B. Public Officials Do Not Require Right of Publicity Protection

The right of publicity protects two complementary interests. The first interest is the right for the private person to be free from the public realm. This privacy interest was first recognized by a state court in *Pavesich*.[114] The second interest is that of the public person to control the commercial uses of his public image. This interest has its roots in the Second Circuit's decision in *Haelen Laboratories v. Topps Chewing Gum, Inc.*[115] The privacy dimension of the right of publicity protects the individual's right to choose whether to enter the public realm. The commercial dimensions protect the individual who has entered the public realm from unlawful misappropriations of the public persona. Together, the privacy and commercial dimensions of the right of publicity serve to regulate how individuals develop a public persona, from the decision to remain in the shadows, safe from the public eye, to the conscious cultivation of a commoditized public image.

It is difficult to discern where the interests of a public official fall in the spectrum of the right of publicity. Public officials often have public faces, at least at the highest levels of office. Perhaps at lower levels of the bureaucracy an official may desire remaining in the shadows, preferring to serve without any public glory. However, elevating this desire to a right is inconsistent with an open, democratic government. It is one thing to respect the anonymity of a private citizen, and

113. *See* discussion *supra* Part II.A.1.

114. *Pavesich*, 50 S.E. 68.

115. Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

another to respect the wishes of a government official who wishes to be completely private. In the case of a private citizen, we are affirming his autonomy. However, with a government official, we would be allowing him to elude the discipline of public scrutiny. Similarly, protecting the commercial interests of public officials through the right of publicity assumes that an individual enters the public realm of politics for the same reasons he enters the public realm of business or of entertainment. The world of politics, however, may overlap with that of the marketplace and of the theater, but the three areas serve the public interest through different means and for different ends.[116] Allowing the right of publicity to protect the persona of a public official would create the possibility of sanctuary from public scrutiny and would conflate the varying public arenas of politics and the marketplace into an undifferentiated and confusing sphere.

Just as granting the right of publicity to public officials will not provide any benefits, denying the right of publicity will create no harm that cannot be remedied through other causes of action. Intrusion into a public official's private realm through unwanted photography or wiretapping is actionable outside of the right of publicity.[117] Unauthorized use of a public official's image for advertising or other commercial purposes would most likely constitute false advertising or false endorsement.[118] Furthermore, the denial of the right would not destroy the value associated with a political persona. While the incentive effects provided by the right of publicity for creating a celebrity persona are arguably quite small, they are large by comparison to the incentives the right provides for the cultivation of a political identity. The right of publicity did not make possible Abraham Lincoln's beard, Theodore Roosevelt's wide smile, Richard Nixon's outstretched victory sign, Ronald Reagan's off-hand "well's," or Bill Clinton's saxophone playing. These personae are iconic, part and parcel with the need to cultivate a political identity in order to gather public recognition and votes. The embarrassment of being found unoriginal serves as a better means

116. *See* RAYMOND GEUSS, PUBLIC GOODS, PRIVATE GOODS 12-13, 30-31 (2001) (analyzing differing conceptions of public and private in marketplace and politics).

117. *See* discussion *supra* Part I.

118. *See* discussion *supra* Part I.

for discouraging imitation than the pursuit of a right of publicity claim.

C. An Absolutist Position for the Right of Publicity of Public Officials Is Consistent with Idealistic and Pessimistic Visions of Politics

One argument for denying the right of publicity to public officials is the distinction among different public arenas, particularly the worlds of the marketplace, entertainment, and government. This argument is developed by demonstrating that the right of publicity for public officials is consistent with accepted normative visions of politics,[119] two of which are the idealistic view of politics as a form of public service and the pessimistic view of politics as a means for private aggrandizement. Under either vision, the right of publicity for public officials is unnecessary.

The public spirited vision of politics would negate the requirements for almost any private rights held by public officials, who are, by the very definition of public spiritedness, motivated purely by munificence. However, this rarefied view of politics is too idealized to be of any interest for my argument since it assumes away the problem. A realistic, public-interested vision of politics would posit public governance as solely being about the pursuit of the public good by public officials as administrators who are driven to serve the electorate. The right of publicity has no place within this vision because the unauthorized use of the public official's image poses no threat to his mission of satisfying the public interest. Paparazzi may stalk and hawkers may display the official's face next to their wares, but, except for the case of false endorsement or false advertising, the public interest has not been undermined. The interlopers are nuisances, but nothing of value would be lost because the official's mission is not to cultivate the image or to profit from the image, but, instead, to serve. There, perhaps, is the issue of public confidence, separate from any concern with public confusion, in placing

119. For a discussion of conflicting normative visions of politics, see generally MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996) (discussing the contemporary pursuit for a philosophy of political life); MATTHRE A. CRENSON & BENJAMIN GINSBERG, DOWNSIZING DEMOCRACY: HOW AMERICA SIDELINES ITS CITIZENS AND PRIVATIZED ITS PUBLIC (2002) (describing demise of public sphere in American government).

the elected official's face next to a luxury automobile, laundry detergent, or the latest financial product. However, if the public official continues in his duties, the appearance of his visage in the commercial realm, excepting for cases of falsity, is a mere distraction.

Actual politics, however, does require the maintenance of a public image, and the advocate of a pessimistic vision of politics would contend that the public image is a mask for private aggrandizement. Politics, in the pessimistic sense, is part fun and part profit, with a heavy dosage of the latter. However, allowing public officials to monetize their personae through the right of publicity does not necessarily follow from this pessimistic vision and is, in many respects, inconsistent with its logic. If politicians develop a public image in order to procure votes and are also allowed to profit from the marketing of such an image, the instrumental usage of the public image becomes apparent and difficult to sustain. The electorate cannot be so readily fooled that with one hand it casts a ballot for the politicians and with the other, it purchases overpriced T-shirts, coffee mugs, mouse pads, and other tchotchkies that bear his likeness. Perhaps, the right of publicity is the ultimate product of public choice theory: legal protection created by politicians for politicians.

To view politics as this type of sideshow, designed for entertainment value alone, seems inconsistent with the real effects that political decisions have on people's lives. A real war is different from a staged one. A public official is not put into office simply to entertain us, although there might be great entertainment value in the offing. As such, the pessimistic view of politics cannot articulate why an electorate would choose a public official simply to allow him to profit from the position. Can anyone be that entertaining or have a persona so charismatic? The pessimistic view ignores the public interest motives that bring a person to seek political office and cause people to vote him into office. On the other hand, once some iota of public interest is recognized as necessary for politics, we are brought back to the idealistic vision of politics that was addressed above.

The right of publicity exists to protect the cultivation of one's image in a public arena. However, the political arena is not a relevant public for the purposes of the right of publicity. Whether one is an idealist or one is a pessimist, a public offi-

cial's public persona need not fall within the purposes of the right of publicity and is cultivated for different ends than the persona of an entertainer. The public sphere of politics is not developed in the same way as the marketplace or the theater and, thus, would be damaged through the promotion of the interests that the right of publicity was designed to protect.[120]

IV. THE IMPLICATIONS OF THE ABSOLUTIST POSITION FOR THE RIGHT OF PUBLICITY

The argument for disallowing right of publicity claims by public officials rests on Justice Black's absolutist view of the First Amendment, on the purposes of the right of the publicity, and on the differences between the political and market arenas. Any legal theory, however, should be tested by actual cases. This section tests the absolutist proposal against two cases: the easy case of the Schwarzenegger bobblehead[121] and the hard case of Princess Caroline of Monaco,[122] which was decided by the European Court of Human Rights a month before the bobblehead settlement.[123] These two cases have more in common than temporal proximity; each case illustrates the importance and limits of the absolutist position.

A. Governor Schwarzenegger Unarmed with Bobbling Head

The Schwarzenegger bobblehead case provides an easy case for the absolutist position. The depiction of a sitting governor as a bobblehead figure armed with an assault rifle is a form of commentary that should be protected under the First Amendment. The fact that the sitting governor is a Hollywood action hero adds to the commentary and does not justify a right of publicity claim. To paraphrase Justice Black, the right to criticize and comment on public officials, regardless of whether the commentary is labeled as parody or editorial, should not be compromised by the legal claims of public officials. However, as stated previously, claims should exist when falsity and public confusion are at stake.

Since no jurisdiction has adopted the absolutist proposal, the "easy" bobblehead case may not have been resolved as

120. *See* GEUSS, *supra* note 116, at 95-96.
121. *See* discussion *infra* Part IV.A.
122. *See* discussion *infra* Part IV.B.
123. Case of Von Hannover v. Germany, 40 Eur. Ct. H.R. 1 (June 24, 2004).

neatly as the settlement if it had progressed to trial. Most likely, the district court would have applied some version of the Ninth Circuit's approach in its *Hoffman*[124] decision and scrutinized the transformativeness of the bobblehead doll. It is very likely that the court would have found that the doll was not transformative, but, rather, that it was a mere tschotschke like the T-shirt in *Saderup*[125] or the bust in the Martin Luther King case.[126] The fact that a media defendant was not present, in contrast with the *Hoffman* case, would also weigh against a finding of transformativeness protected by the First Amendment.

My proposed disposition of the dispute is a counterfactual layered upon a counterfactual, an analysis of how the court should have decided the case if it had in fact decided the case. There does not seem to be any meaningful way in which the Ninth Circuit's approach to transformativeness can be applied without compromising First Amendment values raised by the image of Governor Schwarzenegger. To say that the bobblehead is crass commercialization, a knock-off of other Schwarzenegger merchandise, ignores the fact that the figure is of a governor, one that has played action heroes and is associated with a party that has engaged the country in military combat. Ohio Discount Merchandise ("ODM"), the manufacturer of the bobblehead, has recently released a figure of Governor Schwarzenegger dressed in drag as the ultimate "girlie man."[127] Perhaps, this depiction is more clearly a parody or commentary of the governor's attacks on the California legislature. However, these figures, whether in high heels or in camouflage, are three dimensional editorials, easier to digest and interpret than inches of newsprint. To ask whether the figures are transformative of the Schwarzenegger image is to ponder the obvious.

Application of the transformativeness test could reach the same result as the absolutist proposal. The test is not

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124. *See* Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001). One can speculate on the various applications of the transformativeness test, but one possibility for the court would be to consider the satirical aspects of the doll, which played off the militaristic dimensions of the characters that Arnold Schwarzenegger has played.

125. *See* Comedy III Prods., Inc. v. Saderup, Inc., 21 P.3d 797 (Cal. 2001).

126. *See* Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982).

127. *Introduction and Statement of Facts*, *supra* note 112, at 555.

damaged if a judge reasons that the editorial commentary of an assault rifle or high heels is sufficiently transformative to be justified or excused under the right of publicity. The value of the approach, however, is its economy and its clear espousal of First Amendment values. The economy comes from knowing that once a public official's image is being used, there is no right of publicity claim. More importantly, this approach acknowledges that the rules are different for the political arena than for the marketplace. In the political sphere, the creation and appropriation of a political image, whether in high art or lowly bobbleheads, is the type of speech and commentary that the First Amendment was meant to protect.[128] In the marketplace, however, celebrity image has a different meaning, one often not infused with political commentary, and one where the pursuit of ideas has given way purely to the pursuit of profit. It is telling that the settlement did not enjoin the complete use of the Schwarzenegger image. Instead, ODM could continue to sell the bobblehead, but without the assault rifle. Additionally, it must donate a portion of the profits to a charity designated by Schwarzenegger.[129] Consequently, the governor has been able to control how the company can depict his image and how it can spend the profits from the sale of the doll.

A potential difficulty raised by the bobblehead case regarding the absolutist proposal is Governor Schwarzenegger's dual status as celebrity and public official. The dual status does not so much challenge as exemplify the proposal because it acknowledges the multiple fora wherein publicity exists. The argument rests upon accepting the multiple public arenas against which the right of publicity must be understood and, moreover, specifically recognizing the distinctions between the political sphere and the marketplace. In an analysis of the bobblehead case, since Schwarzenegger became a public official, his right of publicity should be terminated. Consistent with the absolutist position for the First Amendment and the purposes of the right of publicity, the governor should lose the right to challenge uses of his public image through a right of publicity claim. Prior to stepping into the

128. *See* SUNSTEIN, *supra* note 97, at 97-98 (arguing that the principle of freedom of speech protects the right to dissent against the government).

129. *Introduction and Statement of Facts*, *supra* note 112, at 555.

governor's mansion, he clearly had the right, under the right of publicity, to sue ODM. Furthermore, the right will return once he is no longer governor. His current status as a public official, and not solely as a celebrity, has altered his public persona.

B. Stalking Princess Caroline

During the 1990s, Princess Caroline of Monaco was the subject of unwanted publicity in three German newspapers: *Freizeit Revue*,[130] *Bunte*,[131] and *Neue Poste*.[132] The newspapers published over fifty photographs of her in public and semi-public places, capturing her dining with a friend,[133] relaxing with her children,[134] and spending time with a paramour on a beach.[135] The pictures had various captions, ranging in taste from the innocuous ("Pure Happiness" captioning a photograph of the princess with her children)[136] to the tawdrily suggestive ("Prince Ernst August played fisticuffs and Princess Caroline fell flat on her face" in an article which included a photograph of the wet, swimsuit clad princess tripping and falling on a Monte Carlo beach).[137]

In 1999, the Federal Constitutional Court of Germany[138] upheld the grant of an injunction against the photographs of the princess with her children by the lower courts, but did not uphold the grant of an injunction against the other photographs because the princess was a "public figure" and the news stories were of legitimate public interest.[139] The princess challenged the German ruling in the European Court of Human Rights.[140] In its ruling against Germany, the European Court found that the German court had not balanced the interests of freedom of press and privacy adequately, thus

130. *See* Case of Von Hannover v. Germany, 40 Eur. Ct. H.R. 1, ¶ 10 (June 24, 2004).
131. *Id.*
132. *Id.*
133. *Id.* ¶ 11.
134. *Id.* ¶ 13.
135. *Case of Von Hannover*, 40 Eur. Ct. H.R. ¶ 17.
136. *Id.* ¶ 13.
137. *Id.* ¶ 17.
138. *Id.* ¶¶ 18-24.
139. *See id.* ¶¶ 24-38.
140. *See id.* ¶¶ 1-7. The European Court of Human Rights hears claims of violations of the European Court of Human Rights based on final acts by states in the European Union.

contravening Article 8 of the European Convention of Human Rights,[141] which guaranteed to citizens a right of privacy.[142] The photographs had violated the princess' legitimate expectations of privacy and did not disseminate ideas, but, instead, "images containing very personal or even intimate 'information' about an individual."[143] Therefore, the European Court concluded that enjoining the photographs would not violate any legitimate freedom of expression interests.[144]

The Princess Caroline decision is a difficult one for the absolutist position. Two possible factual elements may reconcile the result with this proposal. First, the interests of Princess Caroline's children and friends, who are not public officials, were implicated by the photographs, and, therefore, it is their publicity interests that were vindicated. While this reasoning may explain the German court's ruling, the European Court was clearly vindicating the princess' privacy and publicity rights. The second possibility hinges upon the distinction between public officials in Justice Black's conception of the First Amendment[145] and those members of a monarchy. In Europe, the members of the royal family are celebrities, much like actors. They are far removed from the public officials whose political decisions affect the lives of the private citizen, and, therefore, should be subject to close scrutiny. If the world of public officials and actors are two different public realms, then perhaps the world of the royal family is yet a third realm, more closely aligned with the world of actors than that of elected officials. In short, the absolutist position is not challenged because Princess Caroline is not a public of-

141. Article 8 reads as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

EUROPEAN CONVENTION OF HUMAN RIGHTS art. 8 (Nov. 4, 1950), *available at* http://www.hrcr.org/docs/Eur_Convention/euroconv3.html (last visited Apr. 9, 2005).

142. *See Case of Von Hannover*, 40 Eur. Ct. H.R. ¶ 43.

143. *Id.* ¶ 59.

144. *Id.* ¶¶ 58-60.

145. *See* discussion *supra* Part I.

ficial.

Because the United States has forsaken the public realm of the monarchy, the second resolution is satisfactory. If the Princess Caroline decision can be understood purely as applying to how the rights of the monarchy must be respected, then the implications regarding the right of publicity and freedom of expression in the United States are minimal. It may be difficult, however, to limit the persuasiveness of the decision solely to those persons of royal blood. Neither the language of the European Convention nor the decision of the European Court limits the right of publicity to the monarchy. Thus, it would not be a reach to apply its reasoning to a case involving photographs of prominent U.S. political figures, such as the Bush family. The problem is that the argument for the absolutist position rests on two prongs: the right to criticize public officials as stated broadly by Justice Black and the different realms of the public against which the right of publicity should be understood. Missing from the analysis is a full consideration of the private lives of public officials, and whether such privacy should be relinquished under the right of publicity.

Part of the problem with the absolutist position stems from the dual goals of the right of publicity to protect both personal and economic rights. The problem for the absolutist position that was created by the Princess Caroline decision reflects the difficulty of reconciling personal and economic interests within the right of publicity jurisprudence, specifically, and within jurisprudence more broadly. Another dimension of the problem is the extent to which all information about a public official is of legitimate public interest. The European Court ruled that the press had crossed the line between public and prurient interest in its reporting on Princess Caroline. However, it is not clear from the decision how the line is to be drawn. After all, why should not every dimension of the life of a public official, from how he treats his children to how he conducts his sexual life, have some legitimate public interest? If the information may affect some citizen's voting decision, why should the citizen be denied the relevant information?

What this argument implies is that the absolutist position will have to be limited when the private lives of public officials have been violated. Perhaps these limitations can be

handled through judicious use of other tort claims, such as intrusion or false light. Alternatively, they can be handled as limits within the First Amendment itself. For example, in order to use the First Amendment shield, the First Amendment claimant must establish legitimate public interest in use of the public official's image. Using other tort causes of action as a limit is the stronger of the two approaches. Many of Princess Caroline's claims seem to be stronger false light, defamation, or intrusion claims than right of publicity claims. The danger to be avoided is turning the right of publicity into a property right in one's name or likeness that permits a public official to stifle all uses of that name or likeness. The absolutist position will prevent this danger, and more careful consideration of how to protect the private lives of public officials through non-publicity tort claims will serve to reconcile the absolutist position with the problems illustrated by the European Court's decision in the Princess Caroline case.

C. A Chink in the Absolutist Armor?

Intrusion into the private lives of public officials, the privacy component of the right of publicity, poses some challenges for the absolutist position. The challenges may demonstrate a limitation of the absolutist proposal and lead the analysis back to the balancing approach, which is contrary to the position in the right of publicity context. However, the absolutist position is still worth considering as a way to bring some order to the tensions between the First Amendment and the right of publicity.

The absolutist First Amendment position is narrow in its application because private citizens and public figures do not fall within its domain. Though narrowly drawn, the absolutist position is crucial in application because it will limit the rights of public officials to stifle critical commentary without requiring courts to scrutinize the commentary under a vague transformativeness test. Therefore, the absolutist position is a step in the right direction under both First Amendment and right of publicity law. The absolutist position eliminates the need for balancing tests. The trouble with balancing tests is not uncertainty or relativism, both of which, counterintuitively, are the boons of balancing. Rather, the problem is that not enough consideration is paid to what and why the judge is required to balance.

Examination of the absolutist position is desirable not because it marks the end of the balancing test, but because it forces us to reconsider what it is we are balancing when enforcing the right of publicity. The proposition is not to expand the absolutist position to all applications of right of publicity, but to identify and eliminate one area, the right of publicity of public officials, where balancing is unnecessary and inconsistent with First Amendment and right of publicity values. By identifying one area of absolutism, the goal is to enlighten discussion in other areas where such an absolutist position may be less tenable, such as violations of the right of publicity of private citizens.

The Princess Caroline case does not so much put a chink in the absolutist armor that I would like to place around the First Amendment as it causes us to rethink what we mean by privacy and to what extent privacy rights should extend to public officials. Although it is difficult to conclude that the freedom of expression should completely block the claims of Princess Caroline, it is easy to place her claims outside the realm of the right of publicity. What makes the bobblehead case easy to resolve is that Schwarzenegger should not be allowed to profit from his celebrity image while in public office. While the Princess Caroline case is difficult for an absolutist vision of the First Amendment, it is relatively clear that her claims are not about property or economic interests in her likeness at all. All she sought was the type of isolation and anonymity that her celebrity belies and that the privacy prong of the right of publicity originally sought to protect. The difficult question is how to reconcile personal and economic interests, especially when they become conflated in the right of publicity.

V. CONCLUSION

This article presented a simple point: the right of publicity of public officials, as famously articulated by Justice Black, should be limited in order to be consistent with First Amendment values and the purposes of the right of publicity. Justice Black's normative vision of the First Amendment makes the bobblehead case an easy one to resolve. However, the vision becomes more complicated when the private lives of public officials are taken into consideration, as the Princess Caroline decision demonstrates. The absolutist proposal re-

quires close scrutiny of the appropriate boundaries between privacy and publicity for the purposes of the First Amendment and the right of publicity.

The simple point, espoused above, exposes a deeper one. The right of publicity has been conceptualized as purely a question of celebrity. What have been ignored are the multiple public fora in which publicity arises. The simple point requires us to rethink how publicity in the political sphere differs from that in the marketplace. Regardless of how we view these multiple public spheres, the First Amendment requires special scrutiny of the right of publicity when the political sphere is implicated. Otherwise, the right of publicity will be used to turn all public relationships, even ones imbued with public accountability, into commercial ones. The possibility of such an undesirable result is at stake if we allow an army of bobbleheads carrying assault rifles to be terminated by a public official armed with the blunt sword of the right of publicity.

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